

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF)
DELMARVA POWER & LIGHT COMPANY) PSC Docket No. 17-0978
FOR AN INCREASE IN NATURAL GAS)
BASE RATES (FILED AUGUST 17, 2017))

ORDER NO. 9382

AND NOW, this 21st day of May 2019:

WHEREAS, on February 14, 2019, the Hearing Examiner issued his proposed findings and recommendations in Phase II of this docket for the Delaware Public Service Commission's ("Commission") review and consideration; and

WHEREAS, pursuant to 29 *Del. C.* § 10126(b), exceptions, comments and argument on the proposed findings and recommendations were due on March 6, 2019; and

WHEREAS, the Delaware Division of the Public Advocate ("DPA") requested the Commission's Executive Director for an extension of the exception, comment and argument deadline to March 11, 2019, which request was not opposed by either Delmarva Power & Light Company ("Delmarva" or the "Company") or Commission Staff ("Staff"); and

WHEREAS, pursuant to the DPA's request, the Executive Director also scheduled oral argument on the exceptions, comments and argument for the Commission meeting on April 16, 2019; and

WHEREAS, on March 11, 2019, the DPA and Staff filed a Joint Brief on Exceptions ("JBOE"), and Delmarva filed an "Opening Brief on Exceptions;" and

WHEREAS, on April 11, 2019, Delmarva's outside counsel filed: (1) a "Reply Brief to Staff and DPA's Joint Brief on Exceptions;" (2) a

"Compendium of Authorities Cited to in Delmarva Power & Light Company's Reply Brief to Staff and DPA's [JBOE];" and (3) a cover letter requesting the Commission's Secretary to forward the materials to the Commission for review prior to the April 16, 2019 meeting; and

WHEREAS, before Staff and the DPA had an opportunity to respond to Delmarva's filing, the Commission's Executive Director issued a letter to Delmarva's outside counsel advising that he would not forward Delmarva's reply brief to the Commissioners; however, if Delmarva insisted that its reply brief be sent to the Commissioners, then: (1) other parties would be given an opportunity to file responses; and (2) the docket would be removed from the April 16 agenda and rescheduled for another meeting due to the Commissioners' desire to receive all meeting materials 14 calendar days prior to deliberations; and

WHEREAS, Delmarva's outside counsel responded to the Executive Director that Delmarva elected to allow the other parties to respond and to move the docket to a subsequent meeting; and

WHEREAS, the DPA's counsel emailed the Executive Director, objecting to the option provided to Delmarva and to Delmarva's being permitted to file a reply brief to the DPA's and Staff's JBOE and requesting the Executive Director to reconsider the options he had offered Delmarva because: (1) nothing in the Administrative Procedures Act ("APA") or the Commission's regulations permitted reply briefs on exceptions; (2) even if reply exceptions were permissible, Delmarva had neither requested nor received permission to file them; (3) DPA counsel was not available for the May 7 Commission meeting; and (4) Delmarva's

request, if granted, would encourage parties to file additional material in contested cases, which would impose a burden on the Commission; and

WHEREAS, Delmarva's in-house counsel emailed the Executive Director, agreeing to move the oral argument to a date when DPA's counsel was available, and opposing the DPA's arguments regarding the propriety of Delmarva's reply brief on exceptions, contending that: (1) Staff and DPA's JBOE was 37 pages long; (2) Delmarva had the burden of proof in a rate case; (3) denying Delmarva's request would violate due process; and (4) Staff's and the DPA's JBOE raised important legal issues warranting more complete briefing than simply Staff's and the DPA's position; and

WHEREAS, the Executive Director emailed the parties' counsel acknowledging receipt of Delmarva's letter and email, and advised that after further consideration, he concluded that neither the APA nor Commission regulations provide for reply briefs to a hearing examiner's report, and that the matter would be heard on April 16, 2019 as scheduled; and

WHEREAS, Delmarva's outside counsel wrote a letter to the Executive Director requesting him to return to his first decision allowing the reply brief on exceptions and moving the date of the oral argument; and

WHEREAS, the Executive Director emailed all counsel that there would be no change in his position and the matter would be held before the Commission as scheduled; and

WHEREAS, on April 15, 2019, Delmarva filed a motion to continue the oral argument scheduled for April 16 (the "Motion") to allow the Commission to consider its reply brief on Staff's and the DPA's JBOE, setting forth some of the foregoing procedural history and arguing that:

(1) the Commission's rules do not prohibit replies to exceptions; (2) Delmarva's reply brief did not constitute exceptions that were required to be filed within 20 days of submission of the Hearing Examiner's findings and recommendations; (3) the Executive Director could (and should) have exercised his discretion to forward the reply brief on exceptions to the Commissioners; (4) Delmarva bears the burden of proof and "basic fairness" required that it be given the opportunity to respond to Staff's and the DPA's JBOE; (5) the JBOE raised a "legal issue that could set an important and far-reaching precedent," and allowing the Commissioners to see only Staff's and the DPA's JBOE "would leave the Commission with an incomplete presentation of the arguments and considerations on this important issue;" and (6) the Executive Director is a part of Staff, which is a party to this docket, and his decisions on what will and will not be presented to the Commission constitute "a patent conflict of interest as well as a violation of due process;" and

WHEREAS, on April 15, 2019, Staff and the DPA filed a joint opposition to the Motion, arguing that: (1) the APA does not provide for reply exceptions and neither Staff nor DPA counsel had ever been in a case before the Commission in which a party requested reply exceptions; (2) even if the APA allowed reply exceptions, Delmarva had not sought Commission approval to do so despite there having been two Commission meetings between the March 11 exception deadline and April 16; (3) the Commission's regulations regarding exceptions do not permit reply briefs on exceptions, but even if they did, such regulations would be impermissibly inconsistent with the APA; (4) even if the Commission had discretion to allow reply exceptions, Delmarva was not denied due process

by not being permitted to file written reply exceptions because there had been a full hearing at which it presented live and prefiled testimony, it briefed the issue (and had the last word with) the Hearing Examiner, who accepted the Company's position, and the Commission was holding oral argument on the exceptions, at which Delmarva could make all of its arguments; (5) even if the Commission had discretion to allow reply exceptions, neither the length of a brief on exceptions nor the subject matter it addresses has any bearing on whether reply exceptions should be permitted; and (6) Delmarva had not overcome the presumption of honesty and integrity to support its claim that the Executive Director had actual bias toward Delmarva; and

WHEREAS, the Commission heard oral argument on Delmarva's Motion and the DPA and Staff's joint opposition, during which the parties made the same arguments set forth in their written papers; and

WHEREAS, the Commission having reviewed the Motion and joint opposition, and having heard oral argument;

NOW, THEREFORE, BY THE 4-1 VOTE OF CHAIRMAN WINSLOW AND COMMISSIONERS CONAWAY, GRAY, AND KARIA (COMMISSIONER DREXLER OPPOSED), THE COMMISSION HEREBY FINDS AND ORDERS AS FOLLOWS:

1. Delmarva's Motion is **DENIED**.
2. For the reasons set forth below, the Commission finds that Staff's and the DPA's argument that the APA does not provide for replies to briefs on exceptions is meritorious.
3. In addition to the Public Utilities Act, this Commission is governed by the APA.¹ The purpose of the APA is to "standardize the

¹29 Del. C. § 10161(a)(3).

procedures and methods whereby certain state agencies exercise their statutory powers"² The Commission appointed a hearing examiner to process this case pursuant to 29 *Del. C.* ch. 101,³ including conducting evidentiary hearings, and in doing so triggered the application of Subchapter III of the APA (Case Decisions).

4. When an agency subject to the APA appoints a subordinate to preside over a formal hearing, the subordinate shall prepare a proposed order for the agency.⁴ The appointed Hearing Examiner did so here. Upon the parties' receipt of the proposed order, the APA provides that they "shall have 20 days to submit in writing to the agency exceptions, comments and arguments respecting the proposed order."⁵

5. The Commission acknowledges that there is some merit to the argument that reply briefs on exceptions would be of some assistance to us on occasion. However, we believe that Subsection 10126(b) of the APA prohibits us from allowing reply briefs on exceptions to another party's timely-filed exceptions to proposed findings and recommendations.⁶ First, Delmarva has not identified any provision in the APA permitting "reply exceptions." Second, the "exceptions, comments and argument" that a party is authorized to submit to an agency subject to the APA are those that address "the proposed order,"⁷ not the exceptions, comments and argument submitted by another party. The General Assembly's stated purpose in enacting the APA was to "standardize the procedures and

²*Id.* § 10101.

³Docket No. 17-0978, Order No. 9109 (August 22, 2017).

⁴29 *Del. C.* § 10126(a).

⁵*Id.* § 10126(b).

⁶All parties agreed to the brief extension of the March 6 deadline for submitting exceptions, comments or argument, and each filed exceptions on the approved date. Thus, we consider the exceptions to have been timely filed.

⁷ *Id.*

methods whereby certain state agencies exercise their statutory powers.”
29 Del. C. § 10101. Furthermore, if we interpret the APA to allow reply exceptions, we would be adding language to the Act that the General Assembly itself did not include. The DPA has cited case law regarding statutory interpretation that provides that courts may not vary the terms of a statute of clear meaning; that courts may not add language to a statute that the legislature has clearly excluded; and that courts ascribe a purpose to a legislature’s inclusion or omission of certain language from a statute. Based on this authority, we find that we have no discretion to add language to a statute that was designed to standardize agency procedures.

6. The Commission retains such jurisdiction and authority to enter such orders in this docket as may be deemed necessary and appropriate.

BY ORDER OF THE COMMISSION:

Chairman

Commissioner

Commissioner

Commissioner

Commissioner

ATTEST:

Secretary